

**ORIGINAL**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**RECEIVED**

JUN 27 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

\_\_\_\_\_  
In the Matter of )  
)  
)

Amendment of Rules and Policies )  
Governing Pole Attachments )  
\_\_\_\_\_ )

CS Docket No. 97-98

**DOCKET FILE COPY ORIGINAL**

**COMMENTS OF AT&T CORP.**

David L. Lawson  
Scott M. Bohannon

1722 Eye Street N.W.  
Washington, D.C. 20006  
(202) 736-8034

Mark C. Rosenblum  
Roy E. Hoffinger  
Connie Forbes

Room 3245G1  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920  
(908) 221-2631

June 27, 1997

No. of Copies rec'd  
List ABOVE

*024*

## TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	ii
INTRODUCTORY STATEMENT .....	1
I. THE COMMISSION SHOULD CLARIFY THAT UTILITIES MAY NOT CIRCUMVENT THE COMMISSION'S RULES BY DOUBLE CHARGING FOR POLE SPACE OR OTHERWISE DISCRIMINATING AGAINST ATTACHERS .....	5
II. THE COMMISSION SHOULD REJECT THE ANTICOMPETITIVE RATE MODIFICATION PROPOSALS BY SWBT AND ELECTRIC UTILITIES .....	10
A. To The Extent The Rate Formula Produces Negative Rates In Isolated Instances, The Commission Should Address Those Cases Through A Waiver Process, Rather Than Through Across-The-Board Modifications That Would Promote Overrecovery In All Other Instances.....	14
B. No Downward Adjustment To The Amount Of Usable Space Is Warranted.....	16
III. AT&T DOES NOT OPPOSE CONFORMING ADJUSTMENTS TO THE RULES NECESSARY TO REFLECT THE CHANGE FROM PART 31 TO PART 32 AND CERTAIN STATES' DISCONTINUANCE OF RATE-OF-RETURN FINDINGS .....	20
A. Mapping Part 32 Accounts To Part 31 Accounts.....	20
B. Rate-of-Return.....	20
IV. THE COMMISSION'S CONDUIT RATE FORMULA SHOULD REFLECT A "ONE- THIRD," RATHER THAN "HALF-DUCT," CONVENTION .....	22
CONCLUSION.....	25
APPENDIX "Pictures Depicting Current Pole Attachment Practices"	

## SUMMARY

Nearly a year and a half ago, Congress passed the Telecommunications Act of 1996, promising to bring local telephone customers more services, lower prices, and higher quality by opening the door to local competition. Since that time, potential entrants like AT&T have encountered many obstacles, legal and economic, that have delayed the development of meaningful local competition. Facilities-based entry, in particular, poses substantial risks that are only multiplied by incumbents' relentless efforts to impede competition.

Nondiscriminatory access to poles, ducts, conduits, and rights-of-way at just and reasonable rates is a necessary condition to both wireline and wireless facilities-based competition. Municipalities, citing disruption, "aesthetics" and environmental concerns, have increasingly adopted measures that render the (unnecessary) duplication of these structures technically infeasible in many areas. The enormous expense required to do so makes it economically infeasible in most other instances.

Accordingly, the rules adopted here, which will remain in effect for nearly four years -- a critical period in the development of local telecommunications competition -- are especially important. As the Commission has recognized, pole owners have a long history of anticompetitive practices with respect to attachment. These practices have only increased as the Act presages a new environment in which utilities and attachers are direct competitors.

To forestall these anticompetitive activities, the Commission should reaffirm its existing policies against discrimination and extend them to prevent new abuses otherwise likely to emerge in this new environment. First, the Commission should reaffirm that pole owners may not discriminate among attachers either based on the number of attachments occupying a single foot

of pole space, the technology deployed in that space, or the type of service carried over the attachments. The Pole Attachment Act and the Commission's rate methodology address the cost of, and rates for, space on a pole, not the particular use of that space. Thus, the Commission should make clear that pole owners cannot assess multiple attachment charges -- each designed to recover the fully allocated cost of a foot of pole space (or a duct) -- when an attacher makes multiple uses of that foot of space (or duct), through, for example, a wireless attachment, an overlashed cable, a pole bracket, or a dual-side attachment.

Second, the Commission should reject the anticompetitive rate modifications endorsed by SWBT and the electric utilities. These proposals are self-serving and designed only to inflate pole attachment rates and create significant barriers to entry. In particular, SWBT proposes to address a limited "negative rate" phenomenon by suddenly removing net salvage value from the formula altogether without regard for the overcompensation that pole owners have received in the earlier years under the formula. This modification would further exacerbate other characteristics of the formula that already produce overrecovery. Instead, SWBT (and others like it, if any) should simply employ the Commission's existing waiver process.

The electric utilities' proposed decrease to the amount of usable space should be disallowed as well. This improper adjustment relies on at least two false premises. The electric utilities first assert that 18 feet of ground clearance is required under the National Electric Safety Code's specifications. In fact, the NESC only requires 15.5 to 16 feet in most instances. The electric utilities then attempt to characterize the "safety space" as unusable when in fact this space can be -- and is -- used, and, in any event is only required by the presence of the electric utilities'

lines. The electric utilities should accordingly be solely responsible for costs associated with that space.

Third, the Commission should adopt a "one-third-duct" approach, not its proposed "half-duct" method, with respect to conduit rates. The "half-duct" approach would significantly overstate the cost of conduit space, overcompensate conduit owners, and act as a barrier to entry. Industry practice and the admissions of conduit owners like SWBT support the "one-third-duct" approach. Indeed, most conduit being deployed today contains four inner-duct available for occupancy. Thus, even if one inner-duct is reserved for maintenance and emergency needs -- a practice neither necessary nor currently employed in the industry -- three inner-ducts remain available for use.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

\_\_\_\_\_  
In the Matter of )

Amendment of Rules and Policies )  
Governing Pole Attachments )  
\_\_\_\_\_)

CS Docket No. 97-98

**COMMENTS OF AT&T CORP.**

Pursuant to the Commission's Notice of Proposed Rulemaking,<sup>1</sup> AT&T Corp. ("AT&T") hereby submits its comments with respect to the designated issues concerning pole attachment rates.

**INTRODUCTORY STATEMENT**

Incumbent local exchange carriers and other utilities have strong incentives to abuse their bottleneck monopoly control over poles, conduits and other essential structures. Indeed, it was in direct response to "the overreaching and anti-competitive activities of utilities and telephone companies in providing pole attachments,"<sup>2</sup> that Congress passed the Pole

---

<sup>1</sup> Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking (released March 14, 1997) ("NPRM").

<sup>2</sup> Order, Selkirk Communications, Inc. Complainant, v. Florida Power & Light Company, 8 FCC Rcd 387 at n. 11 (1993) ("Selkirk Order").

Attachment Act of 1978, 47 U.S.C. § 224 (1997), which was designed “to constrain the ability of telephone and electric utilities to extract monopoly profits from [those] in need of pole space.”<sup>3</sup>

In 1978, the targets of these anti-competitive activities were cable companies engaged in entirely different lines of business from their pole and conduit hosts. In 1997, both the target groups and the incentives of structure owners not only to inflate the costs of attachments but to deny them altogether have greatly expanded as changes in both the legal and technological landscapes presage an environment in which incumbent LECs, competitive LECs, cable companies, and even electric utilities will be competing to provide the same services to the same customers.<sup>4</sup> Accordingly, Congress in the 1996 Act broadened the definition of the “utilities” subject to attachment regulation (47 U.S.C. § 224(a)(1)), as amended by 1996 Act §

---

<sup>3</sup> Opinion and Order, Heritage Cablevision Associates of Dallas, L.P., and Texas Cable TV Association, Inc. Complainants v. Texas Utilities Electric Company, Respondent, 6 FCC Rcd 7099 ¶ 13 (1991) (“Heritage Order I”). Pole owners continue to engage in anticompetitive conduct. See, e.g., Ohio Cable Telecommunications Ass’n v. Ameritech Ohio, 1997 WL 280132, at \*22 (Ohio PUC, April 17, 1997) (finding that Ameritech discriminated against third party attachers in favor of its own subsidiary); Opinion and Order, Consumer Power Company, No. U-10741, 1997 WL 107296, at \*1, \*14 (Michigan PSC, Feb. 11, 1997) (rejecting utility proposal to raise pole attachment rates from \$4.95 to \$33.61 per pole per year (580%), and finding a reduction to \$3.74 more appropriate).

<sup>4</sup> Even before the 1996 Act, the Commission recognized that “[t]he same anticompetitive concerns which the Senate report referenced with respect to telephone companies are applicable with equal force to electric utilities, which may seek to provide broadband communications services in competition with . . . providers of such services.” Heritage Order I ¶ 13. With the passage of the 1996 Act, all utilities, and particularly those regulated under the Public Utility Holding Company Act, now also have greater opportunities to provide narrowband telecommunications services in competition with potential attachers. See Telecommunications Act of 1996 (104 P.L. 104) at § 103 (amending the Public Utility Holding Company Act of 1935 (15 U.S.C. 79, et seq.).

703),<sup>5</sup> expanded the protected class to include telecommunications attachers (47 U.S.C. § 224(a)(4)), and directed the Commission to develop new rules, to take effect in 2001, "to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments" (47 U.S.C. § 224(e)(1)).

It is, of course, essential that the Commission develop detailed and explicit pro-competitive rules for pole access in its local competition dockets and for pole rates in its permanent rate proceeding to be conducted later this year. Poles, ducts, conduits, and rights-of-way are essential inputs to the provision of all wireline and wireless telecommunications services and will remain so as new technologies are deployed. And it is a simple fact that competitive bypass of existing utility structures will rarely be economically feasible. Nor would it "make economic sense to send cost signals that encourage new entrants to invest in duplicative pole networks or to seek other, more expensive alternatives for access to an infrastructure that is capable of delivering their services." Consumer Power Company, No. U-10741, 1997 WL 107296, at \*10 (Michigan PSC, Feb. 11, 1997). Indeed, as communities increasingly adopt environmental, "aesthetic" and other ordinances that multiply the costs of obtaining necessary rights-of-way and installing structures -- or even flatly prohibit the deployment of aerial wires or wireless towers -- competitive bypass often will not even be a technical possibility.<sup>6</sup> For these

---

<sup>5</sup> The term "utility" now includes "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

<sup>6</sup> See, e.g., the Clayton, Missouri Municipal Ordinance Code, § 7-56.1 (1947) which provides that "[i]t shall be unlawful for any person to erect or construct utility poles or lines for the transmission of electricity, telephone messages or other public utility transmissions above the surface of the grounds within the confines of the city." See also Consumer Power Company, (. . . continued)



reasons, both full and partial facilities-based competitors will be highly dependent upon a utility's poles, ducts, conduits, and rights-of-way. Consequently, Congress' long-term vision of facilities-based competition cannot become a reality unless the Commission (and its state commission counterparts) make every effort through their new access and rate rules to prevent utilities from using pole and conduit "rates, terms, and conditions" (47 U.S.C. § 224(b)(1)) as strategic weapons to disadvantage new entrants.

It is equally important, however, that the Commission act now, in this interim rate proceeding, to safeguard against potentially significant entry barriers that could defeat facilities-based competition before it even has an opportunity to emerge. It will be nearly four years before the permanent rate rules required by the 1996 Act take effect, but carriers are attempting to enter each other's markets today. The Commission should therefore make certain that its existing pole rate formula and rules are not abused by incumbents to inflate the price of access to poles and conduit or to otherwise encumber access by competitive carriers to these essential facilities in ways that stifle nascent competition.

Specifically, the Commission should do three things. First, and most fundamentally, the Commission should clarify that under the existing rate formula, an attacher pays for the use of a given amount of vertical space on a pole (or a given number of inner ducts in conduit) and that the attacher is free (subject to reasonable safety and operational restrictions) to deploy in that space the attachment or attachments of its choice -- without incurring multiple or

---

(... continued)

1997 WL 107296 at \*10 ("duplicative facilities might exacerbate aesthetic and safety concerns in communities that are saddled with competing pole networks").

discriminatory attachment charges that would unjustly enrich pole owners, raise barriers to entry, and discourage efficient use of pole space. Second, the Commission should reject utility proposals to inflate pole rates through self-serving "technical" adjustments to the existing rate formula. The Commission has found that the existing formula's "approximations" cut both ways and "tend to be balanced" (NPRM n.59).<sup>7</sup> Hence, it would be arbitrary and capricious to "fix" perceived "under recovery" aspects of the formula without considering the impact of offsetting "over recovery" aspects (as the Commission presumably will do when it revisits the entire formula in its upcoming permanent rate proceeding). In any event, the particular modifications proposed by the utilities are unwarranted and anticompetitive even examined individually. Third, the Commission should develop a formula and rules to constrain conduit occupancy rates. AT&T agrees with the Commission that this conduit formula (that will apply until the permanent rules required by the 1996 Act take effect) should generally track the existing pole formula. As demonstrated below, however, in order to fully compensate conduit owners without erecting anticompetitive barriers to entry, that formula should reflect a "one-third," rather than a "half-duct," convention.

**I. THE COMMISSION SHOULD CLARIFY THAT UTILITIES MAY NOT CIRCUMVENT THE COMMISSION'S RULES BY DOUBLE CHARGING FOR POLE SPACE OR OTHERWISE DISCRIMINATING AGAINST ATTACHERS.**

The Commission's pole attachment rules are designed to ensure just, reasonable, and nondiscriminatory terms and conditions for the use of pole space. Indeed, the maximum

---

<sup>7</sup> In fact, the "balance" clearly tilts in favor of pole and conduit owners who, inter alia, get the benefit of rates that are highest in the early years when the time value of money is the greatest.

permissible rate under § 224 is expressly a function of "the total usable space" occupied by an attachment, 47 U.S.C. § 224(d)(1), and the Commission's existing maximum rate formula allocates the pole owner's fully allocated costs on the basis of vertical feet. See 47 C.F.R. § 1.1404 et seq. Specifically, under the existing formula an attacher is presumed to purchase the use of one vertical foot of usable space. NPRM ¶ 7. Usable space, in turn, is the vertical "space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment." 47 U.S.C. § 224(d)(2).

Accordingly, a pole owner is fully compensated (indeed, as explained below, generally overcompensated) for the use of a vertical foot of pole space by the payment of a single attachment charge at the maximum permissible rate. In practice, however, it is increasingly possible -- through "dual side" attachments,<sup>8</sup> "overlashing,"<sup>9</sup> pole "brackets"<sup>10</sup> and other means -- for two or more attachments to occupy a single vertical foot of pole space. Such practices are already commonly employed by pole owners today,<sup>11</sup> and, so long as carried out in accordance with industry practice, they present no material safety or operational concerns. Pole owners, however, have apparently attempted to collect multiple charges for use of a single foot of pole

---

<sup>8</sup> Dual side attachments, sometimes referred to as "backside" attachments, arise when attachments are placed on more than one side of a pole as opposed to a single pole face. Examples of dual side attachments are shown in Pictures 2-9, 15-18, and 23-25 of the attached Appendix.

<sup>9</sup> Overlashing, sometimes referred to as co-lashing, is the securing of a new cable to an existing cable and strand in lieu of placing the cable as a separate attachment from other cables. The lashed cable does not require additional space on the pole.

<sup>10</sup> Pictures 11-14 included in the attached Appendix illustrate the use of pole brackets, which provide another means for multiple attachments.

<sup>11</sup> See, e.g., Bellcore "Blue Book-Manual of Construction Procedures," Bellcore #SR-TAP-001421, Issue 1, December 1989, Section 3, ¶ 3.07 (discussing the use of dual side attachments);

space -- or worse, have restricted or prohibited multiple attachments altogether.<sup>12</sup> It is plainly discriminatory and anticompetitive for an attacher seeking access to a "full" pole (i.e., a pole with one attachment per foot of usable space) to be asked to pay the substantial "make ready" charges to install a totally unnecessary new pole when other more cost effective methods are available.<sup>13</sup> Such practices impede efficient competition, overcompensate pole owners and are unjust, unreasonable and discriminatory in violation of the terms and intent of the 1996 Act, the Pole Attachment Act and the Commission's pole attachment regulations and precedents.<sup>14</sup>

To discourage these practices, the Commission should clarify that pole owners may not prohibit or limit technically feasible multiple uses of pole space and may recover no more

---

<sup>12</sup> See, e.g., Ohio Cable Telecommunications Ass'n, at \*14 ("[Ameritech's subsidiary] was permitted to use brackets while all of complainants had pole attachment agreements which forbade such devices"); Id. at \*6 (Ameritech witness "testified that other Ameritech operating companies in Illinois and Michigan had begun to permit the use of brackets to create space on poles for attaching cable"); Id. at \*19 (Ohio Rev. Code § 4905.71(B) (Anderson 1997) permits "attachment of any wire, cable, facility or apparatus"); In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, "Opinion and Order Setting Pole Attachment Rates," at 14-15 (New York PSC, June 17, 1997) (discussing the electric utility industry proposals for assessing fees for co-lashed attachments).

<sup>13</sup> See, e.g., Ohio Cable Telecommunications Ass'n, at \*18 ("Complainants have testified that they might have been able to avoid make-ready work or to avoid replacing poles, but Ameritech did not allow such use until [its affiliate] began to install its facilities").

<sup>14</sup> See, e.g., Selkirk Order at n.18 ("The key question would be whether the addition of extra cables" or nontraditional attachments "caused the utility to incur increased costs"); Heritage Order I ¶ 31 (under the statute, a rate is just and reasonable if it: "assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole"); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 ¶ 1156 (1996) ("*Local Competition Order*") ("the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access").

than one attachment charge for each vertical foot of pole space (and each inner duct in conduit). If an attacher places two or more attachments on a pole in such a way that they do not occupy more than one vertical foot of usable space (and pays reasonable make ready charges for any activities necessary to facilitate the multiple uses), then it should pay only a single attachment charge for the use of that one foot, and not a separate charge for each attachment.<sup>15</sup> Hence, an attacher should only pay a single charge for overlashed cables or for two attachments in the same vertical foot of space -- even if the attachments are not on the same face of the pole or make use of pole brackets (the reasonable costs of which the attacher will presumably pay in the form of make-ready charges).<sup>16</sup> The same rule should apply to multiple cables placed in a single conduit space. The conduit occupant is paying for the use of an entire inner duct and should not incur two charges simply because it has installed two cables in that space. These clarifications are necessary to prevent ongoing anticompetitive activities, and they will become even more important as competition increases and new technologies are deployed making pole and conduit space increasingly scarce.

---

<sup>15</sup> Even this approach is overly generous given that most attachments actually occupy less than the foot of vertical space presumed by the formula.

<sup>16</sup> As a practical matter, operational concerns such as the practices of placing attachments from the top down and filling the front side of a pole before adding backside attachments may result in the same vertical foot of pole space being shared by unaffiliated attachers. In such situations, the owner should allocate a single charge at the maximum rate among the attachers sharing that space. The only alternative consistent with Commission's goal of limiting overrecovery and the statutory "just, reasonable and nondiscriminatory" requirement would be to double the amount of usable space in the pole attachment rate formula to reflect the attachment "slots" available on both sides of the pole or to reduce by at least half the presumptive amount of space occupied by an attachment.

Similarly, the Commission should reaffirm that pole owners may not discriminate among attachers, and that the same maximum permissible rate determined from the Commission's formula applies to each foot of space used by attachments, regardless of the technologies employed or the services provided by the attachments in that space.<sup>17</sup>

For example, rapid growth of wireless services will present pole owners with increased opportunities to engage in anticompetitive and discriminatory conduct, absent the requested clarification. Wireless carriers' attachments may include microcell facilities or antennas attached to the side or top of utility distribution poles. These facilities could be connected to coaxial lines routed vertically on the outside or through the center of the poles to the base, where the lines would connect with cabinets housing associated electronics.<sup>18</sup> To the extent that space occupied by such wireless facilities can be used by other attachers, the utility should not be allowed to recover multiple attachment fees for the use of the same space. Wireless carriers may also need poles that exceed the height of poles utilities have historically deployed for attachments by electrical or telephone service. While an attaching entity requiring new or additional poles has historically borne the "make-ready" costs of preparing a pole for such use, the Commission should clarify that other telecommunications providers that use the additional space available on a taller

---

<sup>17</sup> See also Heritage Order I ¶ 32 (a pole owner "lawfully may not charge . . . different pole attachment rates depending on the type of service being provided over the equipment attached to its poles" because different rates would be "unjust and unreasonable under Section 224"); Selkirk Order ¶ 4 (a pole owner's "imposition of a charge higher than the regulated Section 224 rate for pole attachments used to provide nonvideo services is unjust and unreasonable"); 47 U.S.C. § 224(a)(4) ("The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility") (emphasis added).

<sup>18</sup> Of course, these attachments would comply with applicable National Electric Safety Code ("NESC") standards.

pole should be required to pay a proportionate share of those costs and that a pole owner may not double charge for use of the new space created by extending the pole.<sup>19</sup> The Commission has also held that parties who add to or modify their attachment after another party's modification should share in the cost if the modification made their attachment or modification possible.<sup>20</sup> These policies should apply with equal force to modifications made by wireless carriers that benefit wireline or other wireless attachers.

## **II. THE COMMISSION SHOULD REJECT THE ANTICOMPETITIVE RATE MODIFICATION PROPOSALS BY SWBT AND ELECTRIC UTILITIES.**

By design, the Commission's existing pole attachment formula produces only rough approximations of relevant pole costs at any particular point over their service lives. Investment, height, age, salvage value (or cost), usable space and other relevant factors can all vary from pole to pole or area to area, but Congress made clear that it intended the Commission to "make its best estimate" consistent with "a minimum of staff, paperwork and procedures." NPRM ¶ 4 (citing legislative history). The pole attachment formula that the Commission has developed over the past two decades (and that will continue to govern pole attachment rates until the new formula mandated by the 1996 Act goes into effect) therefore makes do with a series of assumptions, averages and rebuttable presumptions.

---

<sup>19</sup> 47 U.S.C. 224(h); see also Local Competition Order ¶¶ 1211-16.

<sup>20</sup> In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, Amendments and Additions to the Commission's Rules Governing Pole Attachments, CS Docket No. 96-166, Memorandum Opinion and Order (rel. May 22, 1997).

It is one thing to say that this formula and resulting rates are imperfect. They plainly are. It is quite another thing, however, to attempt, as SWBT and other monopoly pole owners do here, to use that as an excuse for self-serving modifications designed to inflate pole attachment rates and raise significant barriers to the facilities-based entry envisioned by the 1996 Act. And that is precisely what these utilities' proposed "technical" modifications to the formula's treatment of, inter alia, salvage cost, pole height, usable space, and electric safety space in response to isolated -- and, in many cases, fabricated -- instances of "under recovery" would do. The utilities simply ignore the existence of offsetting approximations, including, for example the fact that the Commission's formula produces "over recovery in the early phases of the pole's life." NPRM n.59. But it is only because the formula's approximations cut both ways and "tend to be balanced" (id.) that the formula could conceivably be said to produce rates that on the whole do not unduly favor either pole owners or attachers. For that reason, any attempt to address one set of concerns brought forward by one segment of the industry, but not others, would be arbitrary and capricious.

AT&T urges the Commission to: (1) reject in its entirety the utilities' scheme to raise rates under the interim formula; and (2) reserve judgment on appropriate adjustments to -- and, conceivably, the wholesale replacement of -- the pole attachment rate formula until the permanent rate proceeding that Congress directed the Commission to complete by early next year. In this way, the Commission can both learn from ongoing pole attachment negotiations and state regulatory proceedings and avoid unnecessarily increasing barriers to entry created by utility ownership and rate manipulation of essential structures in the critical early stages of competitive entry.



In this regard, the Commission should not lose sight of the fact that its rate formula calculates only maximum permissible rates and that under § 224 an attachment rate is just and reasonable so long as it lies anywhere “between the incremental costs of the utility and the cable operator’s share of the utility’s fully allocated costs.” Report and Order, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4387 ¶ 4 (released July 23, 1987). In contrast to the fully allocated cost upper bound, the incremental cost lower bound encompasses only “those costs which would not be incurred by the utility ‘but for’ the presence of . . . attachments, [which Congress] expected . . . to be minimal, since most [such costs] . . . would have been fully recovered in the make-ready charges.” Id. Further, pole owners have sources of revenue other than pole attachment charges for the fully allocated costs of poles and other structures that they would have placed (and, indeed, did place) in the absence of any pole attachments. For example, rates to customers were designed to recover the fully allocated cost -- including the cost of pole and conduit placement -- of providing power or telecommunications services, and pole owners have never demonstrated that a “shortfall” exists that can only be remedied by pole attachment charges at some inflated maximum permissible rate. Further, pole owners’ “costs” have rarely been subjected to rigorous scrutiny and, like other costs of rate-regulated monopolists, are likely to be inflated.<sup>21</sup> Nor can there be any assurance that pole owners have adjusted their investment and expense accounts to reflect other sources of recovery, including, for example, the insurance proceeds they receive for

---

<sup>21</sup> See, e.g., Further Notice of Proposed Rulemaking, Policy and Rules Concerning Rates for Dominant Carriers, 3 FCC Rcd. 3195, 3205, 3219 (released May 23, 1988); Alfred E. Kahn, The Economics of Regulation (1988).

damaged poles (from fire and motor vehicle accidents, for example). Finally, it is well recognized that pole lives often extend well beyond the depreciation lives used to calculate attachment rates, which has allowed pole owners to collect revenues far in excess of those necessary to compensate them even under a fully allocated cost methodology. For all of these reasons, pole owner claims of "under recovery" should be viewed with significant skepticism.

In any event, the Commission's existing rules provide appropriate safety valves for those rare instances in which application of the Commission's general pole attachment rate formula would create injustices. Key presumptions employed in the formula are rebuttable. See, e.g., 47 C.F.R. § 1.1404(g)(11) ("13.5 feet [of usable space] may be used in lieu of actual measurement, but may be rebutted"). And the Commission has noted that it will consider waiver applications in appropriate cases.<sup>22</sup> In short, there is no conceivable basis to adopt the utilities' proposals for across-the-board "technical" modifications that will only further inflate pole attachment charges.

If the Commission does nonetheless elect to consider the SWBT and electric utility formula modification proposals on their merits in this proceeding, each of those proposals, as demonstrated below, is meritless and would only serve to overcompensate pole owners and impede efficient competition by pole attachers.

---

<sup>22</sup> See, e.g., Order, Heritage Cablevision Associates of Dallas, L.P., and Texas Cable TV Association, Inc. Complainants v. Texas Utilities Electric Company, Respondent, 8 FCC Rcd 373 at n.34 (1993).

**A. To The Extent The Rate Formula Produces Negative Rates In Isolated Instances, The Commission Should Address Those Cases Through A Waiver Process, Rather Than Through Across-The-Board Modifications That Would Promote Overrecovery In All Other Instances.**

The Commission's existing pole attachment rate formula adopts a straight-line depreciation approach that factors in the (generally negative) net salvage value of poles. As the Commission recognizes, this approach necessarily increases rates in early periods while lowering rates in later periods. "This may result in some degree of under recovery" in later years as "net salvage is factored into depreciation rates as a negative amount," but "[s]uch occurrences . . . tend to be balanced by over recovery in the early phase of the pole's life." NPRM n.59. Indeed, the "balance," if anything, tilts in favor of the pole owner, who "has the use of any over-recovered amounts until the disposal of the poles actually takes place." NPRM ¶ 26.<sup>23</sup>

Having enjoyed the "early phase" over recovery for many years, SWBT now asks the Commission to change the rules in the middle of the game to "protect" it from under recovery in the later years. SWBT's proposal should be rejected.

As an initial matter, there is no evidence that the "problem" identified by SWBT as affecting a single state in its five state monopoly service area is in any way significant. When SWBT filed its initial petition in 1994, it attracted only one supporter, U S WEST. Accordingly, to the extent it warrants any action at all, the net salvage issue should be addressed through the existing waiver process. Indeed, the Commission has previously made clear that a pole owner

---

<sup>23</sup> See also NPRM n.49 ("accumulated depreciation accounts for telephone companies include the total depreciation taken on plant in service. Since the depreciation rates factor in the salvage values of plant less the cost of removal, the account effectively includes an accrual for the cost of removal").

may always seek relief from the Commission in those rare cases in which application of the general formula produces rates that are demonstrably lower than incremental costs.<sup>24</sup> See also NPRM n. 61 ("the proposed adjustment to accumulated depreciation for poles should be limited, since there is no record that rates generally need adjustment and general applicability of the proposed adjustment may tend to increase such pole attachment rates").

In all events, it is a matter of simple mathematics that SWBT's proposal to suddenly remove net salvage from the formula itself -- after SWBT and other pole owners have had the full benefit of early phase over recovery under that formula -- is vastly overbroad and would create overrecovery in far more cases than it "cured" under recovery. Lower rates in later years are absolutely necessary to balance out overcompensation that has already occurred, especially recognizing that the time value of money is highest in the earlier periods.

Further, even putting aside the general over recovery problem, SWBT's proposal does not involve merely removing a single factor -- net salvage -- from the formula. As the Commission recognizes, any such adjustment would have complex tax and rate-of-return implications that would need to be addressed through a series of additional adjustments to the formula.<sup>25</sup> A much simpler<sup>26</sup> -- and much more equitable -- approach would be to authorize pole

---

<sup>24</sup> See, e.g., Order, Heritage Cablevision Associates of Dallas, L.P., and Texas Cable TV Association, Inc. Complainants v. Texas Utilities Electric Company, Respondent, 8 FCC Rcd 373 at n.34 (released January 13, 1993) ("Should this rate fall below the statutory minimum prescribed by the statute, TU Electric may, of course, seek relief from the Commission pursuant to Section 224"); Id. ¶ 17 ("The Commission Order stated if the utility could make a showing of increased costs that cause the regulated rate to fall outside the bounds of the statutory formula, they could seek relief at the Commission").

<sup>25</sup> If the Commission nevertheless modifies the formula to remove net salvage, AT&T agrees that it must take steps to minimize the degree of overcompensation that will necessarily result. First, the modified formula should apply only where pole attachment rates would otherwise be  
(. . . continued)

owners in those rare instances when application of the formula would produce a negative rate to instead retain the preceding period's positive rate. Any pole owners dissatisfied with that approach could, of course, seek a waiver and, upon full cost support, charge rates based on incremental costs. Unlike SWBT's proposal, this approach would both prevent pole owners from gaming a mid-stream rule change and ensure that rates always lie within the statutorily approved range of reasonable charges.<sup>27</sup>

**B. No Downward Adjustment To The Amount Of Usable Space Is Warranted.**

Instead of accommodating the expanding need for access to poles, ducts, conduits, and rights-of-way, electric utilities have simultaneously taken the remarkable positions that the presumptive pole height (and thus costs) should be increased while the presumptive amount of

---

(... continued)

nonpositive. NPRM n.59, ¶ 25 ("We believe that the adjustment may properly be applied only after the net asset balance for poles has become negative"). Second, the Commission should apply a negative return carrying charge and adjust the tax component as proposed (id. ¶¶ 26-27) to reflect the fact that the inclusion of net salvage creates not only overrecovery in early years, but a regulatory "asset" on which pole owners have enjoyed an unwarranted return in early years.

<sup>26</sup> See, e.g., American Cablesystems of Florida v. Florida Power & Light Co., CC Docket No. 95-95 ¶ 10 (released June 15, 1995).

<sup>27</sup> The use of gross book costs would also result in overcompensation. Specifically, the decrease in carrying costs could be far overshadowed by the substantially larger investment base. And, despite extensive cost recovery to date, the cost recovery process would be effectively reset to the beginning of the pole's life -- at least so far as maintenance, depreciation, and administrative costs are concerned -- the period when pole attachment rates are highest. Thus, the Commission is correct in its belief "that because of the way administrative costs are allocated, the application of gross book costs may produce a . . . higher rate." NPRM ¶ 29. The Commission has always "stated a preference for 'net' figures" (TeleCable of Piedmont v. Duke Power Co., "Hearing Designation Order," CC Docket No. 95-93 ¶ 13 (released June 15, 1995)) and isolated instances of negative rates that are easily curable through a waiver process surely cannot justify scrapping the net book cost formula in its entirety.

usable space should be decreased.<sup>28</sup> At least two false premises underlie this sleight of hand. The utilities first urge that the Commission's 18 foot average clearance assumption ignores "line sag" and that, accounting for line sag, 19.8 feet of clearance is necessary to meet the National Electric Safety Code's ("NESC") 18 foot ground clearance specification. But that would substitute a maximum clearance value for the Commission's proper use of an average clearance value in a formula designed to estimate average pole costs. In this regard, the NESC only requires 18 feet of clearance when an electric line is crossing "[r]oads, streets, and other areas subject to truck traffic." NESC at 78. Moreover, as the NESC makes clear, the 18 foot clearance specification applies only to electric lines; telecommunications companies are only required to provide 15.5 to 16 feet of ground clearance -- a figure that falls to 15 feet in some instances. *Id.* at 78-79.<sup>29</sup> Line sag is similarly sensitive to many factors, particularly the distance between poles and the type of wire or cable. For example, a 900 pair copper cable weighs approximately 2.8 lbs./ft. whereas a reinforced sheath fiber optic cable weighs only approximately 0.15 lbs./ft.<sup>30</sup> Thus, the utilities have offered no legitimate basis to change the existing 18 foot presumption -- although the clearance requirement for some poles (*i.e.*, electric poles spanning roads) may be slightly higher, the clearance requirement for most poles is significantly lower.

---

<sup>28</sup> "Just and Reasonable Rates and Charges For Pole Attachments: The Utility Perspective," A Position Paper Presented By: American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company (filed Aug. 28, 1996) ("Utility White Paper").

<sup>29</sup> Washington requires that all attachments "be placed not less than twelve feet above the surface of the ground." Wash. Rev. Code § 70.54.090 (1997) (emphasis added).

<sup>30</sup> Picture 10 in the attached Appendix depicts the difference the different weights of copper cable and fiber optic cable can have on the degree of line sag. Of course, other factors such as the amount of tension on the cable also affect the amount of line sag.

Second, the utilities' claim that the 40-inch "safety space" between electric and communication lines required by NESC should be treated as unusable space -- rather than usable space properly assigned to the electric utility whose hazardous lines create the need for that space -- is meritless. It is solely the presence of the electric utility's hazardous lines that makes this safety margin necessary, and for that reason alone it is appropriate that electric utilities bear the full cost of that space -- which but for the presence of the hazardous electric lines could be used by attachers.<sup>31</sup> In other words, the electric utility is actually using that space even if its lines do not physically occupy the safety space. Moreover, many poles do not have electric lines attached to them and thus they are more fully utilizable by low voltage attachers. In any event, the safety space clearly is usable by electric utilities. See Opinion and Order, Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144 ¶ 10 (released March 10, 1980) ("[t]he issue is not whether the space is actually used, but whether it is usable"). The presence of third party attachers on the pole in no way diminishes the ability of an electric utility to use the safety space and, although third party attachers are not permitted to use the safety space, that space is usable to accommodate "street light brackets, transformers, and the like [which] are 'associated equipment' within the meaning of the provision." Id. Further, not only

---

<sup>31</sup> The New York Public Service Commission recently reaffirmed its decision not to allocate the cost of electric safety space to attachers, (In the Matter of Certain Pole Attachment Issues Which Arose in Case 94-C-0095, "Opinion and Order Setting Pole Attachment Rates," at 14-15 (New York PSC, June 17, 1997)), as did the Illinois Commerce Commission less than 4 years ago. Order, Re Pole Attachments by Cable Television Systems, 80-0249 (Ill. Commerce Comm'n, Dec. 23, 1993), aff'd Central Illinois Pub. Serv. Co. v. Illinois Commerce Comm'n, 644 N.E.2d 817 (Ill. Dec. 1994).

do electric utilities actually use safety space for these purposes,<sup>32</sup> AT&T understands that some utilities have recently proposed placing non-conductive telecommunications cables in the safety space. In sum, the electric utilities proposed usable space adjustments are entirely improper and provide no legitimate basis for changing the rate formula presumptions<sup>33</sup> (although the utilities are, of course, entitled to attempt to rebut those presumptions in specific cases).<sup>34</sup>

Finally, the utilities related attempt to inflate pole costs by removing 30-foot poles from cost calculations because such poles are “unusable” for attachments is equally baseless. As the utilities are well aware, 30 foot poles can be -- and, indeed, are -- shared. Indeed, correcting for the electric utilities’ flawed ground clearance and safety space assumptions, even a 30 foot pole will have more than six feet of usable space. Moreover, 30 foot poles not only remain in use, pole owners continue to deploy them in large numbers.<sup>35</sup>

---

<sup>32</sup> Pictures 19-22 in the attached Appendix depict examples of a streetlight being placed in an electric utility’s safety space.

<sup>33</sup> See also Central Illinois Pub. Ser’v Co. v. Illinois Commerce Commission, 644 N.E.2d 817 (Ill. Dec. 1994) (Illinois applies a rebuttable presumption of 14 feet of usable space).

<sup>34</sup> Other proposals in the Utility White Paper, including the proposals for onerous “approval,” “identification” and “notification” requirements (at 18-21), are clearly beyond the scope of this proceeding and should be addressed with other structure access issues in the Commission’s local competition dockets. In those proceedings, it will, of course, be critical that the Commission safeguard nondiscriminatory access by telecommunications companies to these facilities.

<sup>35</sup> Statistics on the heights of new poles are compiled by the Southern Pressure Treaters Association, among others. It is AT&T’s understanding that over 20% of the new wood poles ordered in recent years have measured 30 feet or less.



**III. AT&T DOES NOT OPPOSE CONFORMING ADJUSTMENTS TO THE RULES NECESSARY TO REFLECT THE CHANGE FROM PART 31 TO PART 32 AND CERTAIN STATES' DISCONTINUANCE OF RATE-OF-RETURN FINDINGS.**

Although AT&T opposes the utilities' proposals to modify the rate formula in ways designed only to inflate rates and eliminate the balance the formula is designed to achieve, AT&T does not oppose the Commission's truly technical modification proposals to reflect changes in its accounting rules and in the availability of state data for use in the rate formula.

**A. Mapping Part 32 Accounts To Part 31 Accounts.** As the Commission notes, the current rate formula refers to Part 31 rules that applied at the time the formula was adopted. Part 31 was, however, replaced by Part 32 in 1988, and it is therefore necessary to map the new Part 32 accounts to their Part 31 counterparts and to revise the formula accordingly. AT&T does not oppose the specific mapping proposals in the NPRM relating to the administrative component, the maintenance component and the tax component.

**B. Rate-of-Return.** The Commission has historically required utilities to use their state-determined retail service rates-of-return in the pole attachment rate formula. As the Commission notes, however, many utilities are now subject to incentive regulation, and the state commissions that regulate them therefore no longer have any need to determine rates-of-return. Older rates of return, particularly those calculated during inflationary periods, are unlikely to provide reasonable values for current pole attachment proceedings. Although AT&T agrees that a substitute is needed, the Commission's approved rate-of-return of 11.25% -- which is itself out-of-date and, as the Commission recognized in its Local Competition Order (§ 702) may therefore